

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

UNITED STATES COURT OF APPEALS
FILED
FEB 16 1978
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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PRELIMINARY STATEMENT

The Judge who presided at the proceedings which are the subject of this appeal, and who rendered judgments of conviction in the cases which are the subject of this appeal, was Hon. James S. Holden, District Judge for the United States District Court for the District of Vermont.

STATEMENT OF ISSUES

1. Did the use of the "PROOF OF OFFICIAL RECORD" of Alan R. Miller, as the sole means of proving the bank funds were federally insured violate the confrontation clause of the Sixth Amendment?

2. Did Defendant-Appellant waive his right to make the confrontation argument on this appeal?

3. Should Defendant-Appellant's statements by telephone to a prosecution witness, while Defendant-Appellant was incarcerated, have been suppressed because he was given no Miranda warnings?

4. Did the admission into evidence of the cash boxes, the cash drawers and the cash box tops, together with photographs of a certain crowbar, all against Defendant-Appellant alone, single out Defendant as culpable in this case, and constitute prejudicial error?

STATEMENT OF THE CASE

Defendant-Appellant Dupaw (hereafter Defendant) was indicted in the United States District Court for the District of Vermont on five felony counts, as follows: (1) aiding and abetting a breaking and entering into the Merchants Bank in South Burlington, Vermont, whose funds were alleged to be federally insured; (2) aiding and abetting a breaking and entering into the Franklin-Lamoille Bank in Milton, Vermont, whose funds were alleged to have been federally insured; (3) aiding and abetting the robbery of the Merchants Bank; (4) unlawful possession of funds stolen from the Merchants Bank; (5) conspiracy so to possess those funds.

There was a jury trial on all five counts. Presiding at trial was United States District Judge James S. Holden. At the close of the Government's case, Judge Holden granted Defendant's motion for judgment of acquittal on Count 2 only. The jury convicted Defendant of the remaining four counts.

At the start of the trial there were three co-defendants being tried together with Defendant: Anthony Persuitti, Bernard Woodmansee and Bernard Woodmansee, Jr. During the course of the trial Bernard Woodmansee, Jr. entered a guilty plea to one count of the indictment and the trial was concluded against the remaining two defendants, and Dupaw

This appeal involves three claims of error concerning

the trial court's admission of certain evidence at trial.

First, the Government introduced a certain "PROOF OF OFFICIAL RECORD", purporting to be signed by one Alan R. Miller, in connection with the Government's responsibility to prove, as to each of the above counts, that the bank funds in question were federally insured. (T., pp. 273-274, Appendix, pp. 1-3). No witness was called to the stand at any time in connection with this document. No evidence or other showing was made to the trial court that Alan R. Miller was unavailable to testify at trial. No evidence other than the "PROOF OF OFFICIAL RECORD" was offered or received on the issue of whether the bank funds were federally insured.

Second, certain tape-recordings and transcripts were introduced of telephone conversations between one Paul Caruso, a co-defendant, and Defendant Dupaw. The tape-recordings were made at the request and direction of a government agent, and the conversations occurred while Defendant Dupaw was incarcerated. Defendant was not warned of his rights under Miranda v. Arizona, 384 U.S. 386, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966) (T., pp. 1206-1281).

Third, certain physical evidence, consisting of cash boxes, cash drawers, cash box tops and photographs of a crow bar, were admitted, against Defendant Dupaw only, over his objections (Exhibits 13-16, 18, 36-38).

OUTLINE OF ARGUMENTS

I. THE INTRODUCTION OF THE "PROOF OF OFFICIAL RECORD" WITHOUT ANY WITNESS TAKING THE STAND VIOLATED THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT: SINCE THERE WAS NO OTHER EVIDENCE THAT THE FUNDS INVOLVED WERE FEDERALLY INSURED, THE GOVERNMENT FAILED TO PROVE AN ESSENTIAL ELEMENT OF THESE ALLEGED OFFENSES.

A. The government must prove beyond a reasonable doubt that the funds of the Merchants Bank were federally insured.

B. The Confrontation Clause of the Sixth Amendment was violated by the receipt into evidence of the "PROOF OF OFFICIAL RECORD".

1. The evidence in question was "crucial" to the government's case.

2. The government failed to show the unavailability of Alan Miller, the extra-judicial declarant, to testify at trial.

C. The Federal Rules of Evidence do not alter or modify the requirements of the Confrontation Clause of the Sixth Amendment.

D. Summary of Confrontation argument.

II. THERE IS A PRESUMPTION AGAINST WAIVER OF A CONSTITUTIONAL RIGHT; DEFENDANT DUPAW DID NOT, AT TRIAL, WAIVE HIS RIGHT TO ARGUE, ON APPEAL, THE VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO CONFRONTATION.

III. DEFENDANT'S STATEMENTS BY TELEPHONE TO PAUL CARUSO SHOULD NOT HAVE BEEN ADMITTED INTO EVIDENCE SINCE DEFENDANT HAD NOT BEEN ADVISED OF HIS MIRANDA RIGHTS.

IV. THE ADMISSION INTO EVIDENCE OF THE CASH DRAWERS, CASH BOXES, CASH BOX TOPS AND THE PHOTOGRAPHS OF THE CROWBAR AGAINST DEFENDANT DUPAW ONLY, AND NOT AGAINST ANY OF THE CO-DEFENDANTS, SINGLED OUT DEFENDANT ALONE AS CULPABLE IN THIS CASE, TO HIS PREJUDICE.

ARGUMENTS

I. THE INTRODUCTION OF THE "PROOF OF OFFICIAL RECORD", WITHOUT ANY WITNESS TAKING THE STAND VIOLATED THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT: SINCE THERE WAS NO OTHER EVIDENCE THAT THE FUNDS INVOLVED WERE FEDERALLY INSURED, THE GOVERNMENT FAILED TO PROVE AN ESSENTIAL ELEMENT OF THESE ALLEGED OFFENSES.

A. The Government must prove beyond a reasonable doubt that the funds of the Merchants Bank were federally insured.

Each of the offenses of which Defendant was convicted require proof that the Merchants Bank's funds were federally insured. 18 U.S.C. Sec. 2113.

That the funds were federally insured is an essential element of the Government's case. U.S. v. Wingard, 522 F.2d 796 (2d Cir, 1975).

Because it is an essential element, the Government must prove federal insurance beyond a reasonable doubt. Mullaney v. Wilbur, 421 U.S. 684, 44 L.Ed.2d 508, 95 S.Ct. 1881 (1975).

B. The Confrontation Clause of the Sixth Amendment was violated by the receipt into evidence of the "PROOF OF OFFICIAL RECORD".

The only evidence offered by the Government, and received by the Court, on the issue of federal insurance, consisted of the "PROOF OF OFFICIAL RECORD" shown in the Appendix at pages 1-3. There was no testimony whatsoever offered in connection with this document (T., pp. 272-274).

We submit that the receipt of this evidence constituted a clear violation of the Sixth Amendment right of Defendant "to be confronted with the witnesses against him."

The threshold Constitutional requirements of the Confrontation Clause are described in Turner v. Louisiana,

379 U.S. 466, 13 L.Ed.2d. 923, 85 S.Ct. 1065 (1965):

"In the Constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the evidence developed against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." (pp. 472-3).

The right to confrontation was further amplified in Poin-
ter v. Texas, 380 U.S. 400, 13 L.Ed.2d. 424, 85 S.Ct. 546
(1965):

"There are few subjects, perhaps, upon which this court and other courts have been more nearly unanimous that in their expressions of belief that the right of confrontation and cross examination is a fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed we have expressly declared that to deprive an accused of the right to cross examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law." (p. 405).

As to whether the instant "PROOF OF OFFICIAL RECORD" should be considered by this court as an exception to the requirements of the Confrontation Clause, the following language is instructive:

"The particular vice that gave rise to the confrontation claim was the practice of trying defendants on 'evidence' which consisted solely of ex parte affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact." California v. Green, 399 U.S. 149, 156, 26 L.Ed.2d. 489, 90 S.Ct. 1930 (1970) (emphasis supplied).

The basic confrontation requirement is that the person testifying do so in court: "It is the literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause." California v. Green. *supra*, 157. See also Davis v. Alaska, 415 U.S. 308, 39 L.Ed.2d. 347, 94 S.Ct. 1105 (1974).

The application of the above principles of law to the

trial context, in this judicial Circuit, has been described by this Court in U.S. v. Oats, 560 F.2d. 45(2d.Cir., 1977), at page 83:

"The government does bear the burden of producing extra-judicial declarants or of demonstrating their genuine unavailability whenever the extra-judicial statements being offered at trial are crucial to the government's case."

There is no question in this case that the Government failed to produce the extra-judicial declarant, Mr. Miller.

Therefore, the resolution of the confrontation issue here is reduced to two questions: (1) Is the evidence in question "crucial"? (2) If so, did the government demonstrate the "genuine unavailability" of Alan Miller?

1. The evidence in question was "crucial" to the government's case.

Since the "PROOF OF OFFICIAL RECORD" was the only evidence presented by the Government to prove the essential element of federal insurance of the Merchants Bank's funds, it is as "crucial" a piece of evidence as could exist in a criminal prosecution. The facts of this case are clearly distinguishable from those of Dutton v. Evans, 400 U.S. 74, 27L.Ed.2d. 213, 91 S.Ct. 210(1970), in which the challenged evidence was determined not to be "crucial". It is important to note in the Dutton case, that there was a wealth of

supplementary evidence on the point reflected in the challenged extra-judicial declaration. The challenged evidence in Dutton was so insignificant that Justice Blackmun, in a concurring opinion stated: "the error here, if one exists, is harmless beyond a reasonable doubt." (p. 93).

2. The Government failed to show the unavailability of Alan Miller, the extra-judicial declarant, to testify at trial.

The record in this case is barren of any suggestion, much less demonstration, that Alan Miller, the extra-judicial declarant, was genuinely unavailable. Clearly the Government failed to show, as an exception to the requirement that the extra-judicial declarant appear, that he was "genuinely unavailable." (T., pp.273-274).

C. The Federal Rules of Evidence do no alter or modify the requirements of the Confrontation Clause of the Sixth Amendment.

That F.R.E. 902 requires no extrinsic proof of authenticity of a document such as the instant "PROOF OF OFFICIAL RECORD" in no way eliminates the requirements of the Confrontation Clause of the Sixth Amendment. As was pointed out in Weinstien's Evidence, Sec. 901(a)(02), at page 901-21:

"Merely because a document is authenticated does not mean it is admissible. It may, for example, need to meet the hearsay requirements if it is offered to prove the truth of assertions made in it."

Similarly, F.R.E. 901 does not eliminate an objection based on confrontation grounds. An analogous question was addressed in U.S. v. Oats, supra. In that case this Court carefully distinguished between the hearsay exceptions described in F.R.E. 803 and the confrontation requirements of the Sixth Amendment. The Court indicated that Rule 803 was not promulgated to insure admissibility of certain hearsay evidence, but simply "to prevent automatic exclusion on hearsay grounds." (p. 65).

The same distinction must be made here. F.R.E. 901 does not guarantee admissibility of certain documents; it simply prevents automatic exclusion on grounds of insufficient authentication.

D. Summary of Confrontation Argument.

We have found no case directly on point concerning this particular essential element (federal insurance) of this statutory offense. It is significant, however, that in those cases in which authentication has been challenged and upheld as adequate, a witness was present and testified at trial as to federal insurance. In other words, we located no case which approved of proof of federal insurance without a witness present and testifying. Scruggs v. U.S. 450 F.2d. 359 (8 Cir., 1971) (Vice President of Savings and Loan Association testified); U.S. v. Wingard 522 F.2d. 796 (2 Cir., 1975) (Testimony that certificate of insurance was hanging in the bank); U.S. v. Clemons 532 F.2d. 122 (8 Cir., 1976) (Vice President of Bank testified); U.S. v. Hamilton 452 F.2d. 472 (8 Cir., 1971) (Cashier of Bank testified); U.S. v.

McIntosh 463 F.2d. 251(3 Cir., 1972) (Assistant Vice President and Manager of Bank testified); U.S. v. Phillips 427 F.2d. 1035(9 Cir., 1970) (Operations manager testified); U.S. v. Jackson 430 F.2d. 1113(9 Cir., 1970) (Bank auditor testified); U.S. v. Merrill 484 F.2d. 168(8 Cir., 1973) (Testimony that insurance premiums were paid).

In short, we have found no cases at the Circuit level which support the method of proving federal insurance used by the government in this case; no appellate case law appears to authorize such approval without at least one witness appearing and testifying at trial. We submit that this Court, under the Confrontation Clause of the Sixth Amendment, should not approve of proof of federal insurance with a mere ex parte "PROOF OF OFFICIAL RECORD". We further submit that the convictions of all of the defendants in this case should be overturned, and the charges dismissed since there was no other evidence of federal insurance presented.

II. THERE IS A PRESUMPTION AGAINST WAIVER OF A CONSTITUTIONAL RIGHT; DEFENDANT DUPAW DID NOT, AT TRIAL, WAIVE HIS RIGHT TO ARGUE, ON APPEAL, THE VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO CONFRONTATION.

At trial the following objections were made to the offer of the "PROOF OF OFFICIAL RECORD".

"MR. KITTELL: Your Honor, Defendant DUPAW objects to the use of these documents at this time." (T., p. 273).

"MR. KITTELL: The basis for my objections for these documents is as follows: These documents, although the head of each are original and signed by a notary, are copies of copies within "side" (sic.). They are marked up.

The material is immaterial to this case. The authenticity of the notary has not been noted in itself, so there is no way to in fact insure that these documents are as they say they are." (T., p. 274).

"MR. KILMARTIN: Defendant WOODMANSEE would join in the objection." (T., p. 274).

"MR. SARTORE: Your Honor, I would object on the basis that there is no showing, I don't think it can be presumed that MR. MILLER has personal knowledge to testify regarding entries made in the minutes held in the regular meeting held on April 28, 1934." (T., p. 274).

"MR. BERGERON: Your Honor, WOODMANSEE, JR. would join in the objection." (T., p. 274).

In the event that it is claimed that the above objections are not adequate to preserve a Sixth Amendment argument on this appeal, we submit that the available authority clearly shows the argument was not waived, and was properly preserved, at the trial level.

It is fundamental that "(t)here is a presumption against the waiver of constitutional rights." Brookhart v. Janis 384 U.S. 1. 16L.Ed.2d. 314, 86 S.Ct. 1245(1966).

For a waiver to be effective, it must clearly be established that there was "an intentional relinquishment or abandonment of the privilege." Johnson v. Zerbst 304 U.S. 458(1938).

The underlining policy behind the above rule of law is

expressed in Brooks v. State 209 Miss. 150,155, 46 So.2d. 94,97(19 -):

"Constitutional rights in serious criminal cases rise above mere rules of procedure...Errors affecting fundamental rights are exceptions to the rule that questions not raised in the trial court cannot be raised for the first time on appeal."

We submit that it was not necessary for trial counsel specifically to mention the Confrontation Clause of the Sixth Amendment in order to preserve the confrontation issue for appeal. The objections quoted immediately above were sufficient to preserve the issue, particularly Mr. Kittell's statement that "there's no way to in fact insure that these documents are as they say they are." (T.,p.274).

It is highly significant that neither the "Confrontation Clause" nor the "Sixth Amendment" was specifically mentioned by defense counsel, in an objection made at the trial level, in Chambers v. Miss. 410 U.S. 284,35 L.Ed.2d. 297,93 S.Ct. 1038 (1973). Nonetheless the United States Supreme Court did not find the objections deficient; the confrontation issue was held to be properly before the Court. (See footnote 3 at page 292 in Chambers.).

It is clear in this case that trial counsel did not make a decision based on a "strategy of defense" to allow the questioned evidence in, as in Symons v. Klinger, 372 F.2d. 47(9 Cir., 1967). If such a tactical course had been followed, there would have been a "waiver" of the constitutional

right of confrontation. In this case the clear intent and attempt of various counsel, including Defendant Dupaw's counsel, was to prevent the "PROOF OF OFFICIAL RECORD" from being received in evidence; there was no waiver of the constitutional right.

The right of confrontation is a fundamental constitutional right. In light of the presumption against the waiver of a constitutional right, we submit that the several objections shown above apprised the trial court in this case of the confrontation issue. Our position finds support in Blair v. U.S. 401 F.2d. 387 (D.C. Cir., 1968). In that case trial counsel for the Defendant/Appellant objected to the introduction of his client's confession, the objection being based on the failure of police to give Miranda warnings. Trial counsel did not specify the rights which were omitted by the police, nor did counsel mention the Miranda decision. Nonetheless, the Court of Appeals for the District of Columbia indicated that the Miranda decision had achieved sufficient publicity to make it unnecessary for such a specific objection to be made.

Finally, even if there were no presumptions as described above, we submit that the confrontation issue would have properly been before the trial court, since the specific grounds of the objections of all the defendants was "apparent from the context" of the trial proceedings, within the meaning of F.R.E. 103(a)(1).

III. DEFENDANT'S STATEMENTS BY TELEPHONE TO PAUL CARUSO SHOULD NOT HAVE BEEN ADMITTED INTO EVIDENCE SINCE DEFENDANT HAD NOT BEEN ADVISED OF HIS "MIRANDA" RIGHTS.

Tape-recordings and transcripts of several lengthy conversations between Paul Caruso and Defendant were admitted into evidence over the objection of Defendant. (T., pp. 1206-1281). These conversations occurred while Defendant was incarcerated for offenses unrelated to the instant convictions. All of the telephone conversations were made at the request and direction of the Federal Bureau of Investigation in connection with the investigation of this case.

The lesson of Miranda v. Arizona, supra, is clear, "(t)he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendants unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." (p. 444). The procedural safeguards required by the Supreme Court are the well-known Miranda warnings.

It is undisputed that Defendant was "in custody" at the time these conversations occurred. The fact that Defendant was incarcerated on charges unrelated to the charges which led to these convictions is immaterial; it is sufficient to constitute "custody" that he was incarcerated on unrelated matters at the time he made the statements. Mathis v. U.S. 391 U.S. 1, 20 L.Ed.2d. 381, 88 S.Ct. 1503 (1968).

This case is clearly distinguishable from U.S. v. Viviano 437 F.2d. 295(2 Cir. 1971) and U.S. v. DiLorenzo 429 F.2d. 216(2 Cir., 1970). In both of those cases the Defendant was not in custody at the time he made the statements to which he objected at trial.

Moreover, the conversation between Defendant and Paul Caruso contained numerous direct questions concerning the circumstances which led to the instant conviction. This conversation, we contend, unlike that in U.S. v. Viviano, supra, clearly involved "interrogation" within the meaning of Miranda v. Arizona, supra.

The tape-recorded statements occupy seventy-five pages of the trial transcript. Certainly their introduction constituted significant and effective evidence against defendant at trial. We submit that the admission of these tapes was error, and, in light of the substantial portion of the trial occupied by those tapes, we submit that their admission was highly prejudicial to Defendant.

IV. THE ADMISSION INTO EVIDENCE OF THE CASH DRAWERS, CASH BOXES, CASH BOX TOPS AND THE PHOTOGRAPHS OF THE CROWBAR AGAINST DEFENDANT DUPAW ONLY, AND NOT AGAINST ANY OF THE CO-DEFENDANTS, SINGLED OUT DEFENDANT ALONE AS CULPABLE IN THIS CASE, TO HIS PREJUDICE.

Certain cash drawers, cash boxes and tops of cash boxes were received in evidence at trial (T., pp. 1665, 1669, 2334). Also admitted were photographs of a certain crowbar (T., p. 1780). The above items were received against

Defendant Dupaw only, over his objection.

We contend that Defendant was singled out as the guilty party by the admission of these items against Defendant alone. We further contend that it was prejudicial error to exclude these items against the other defendants at trial.

Our contention finds support, we submit, in case law at the Circuit level. It is fundamental that a conspiracy, once established, is presumed to continue until the contrary is shown. U.S. v. Cirillo 468 F.2d. 1233(2 Cir., 1972).

Further, a conspiracy is completed when the intended purpose thereof is accomplished, but where a conspiracy contemplates a continuity of purpose and a continued performance of acts, it is presumed to exist until there has been an affirmative showing that it has terminated, and its members continue to be conspirators until there has been an affirmative showing that they have withdrawn. U.S. v. Mayes 512 F.2d. 637(6 Cir., 1975).

Since there was no showing that the conspiracy in the instant case had expired, the above items of physical evidence should have been admitted against all of the defendants if admitted at all. By erroneously excluding the evidence against Woodmansee and Persuitti, the trial court prejudicially suggested Defendant Dupaw's guilt to the jury on all of the counts of the indictment.

DATED at Burlington, Vermont this day of
 , 1978.

By:

William C. Kittell

And:

Stephen S. Blodgett,

His Attorneys.

UNITED STATES COURT OF APPEALS

For the Second Circuit

UNITED STATES OF AMERICA)

vs.)

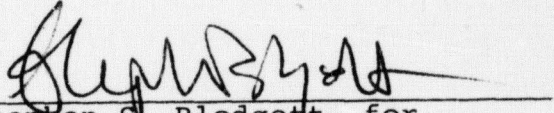
JOSEPH H. DUPAW)

Criminal Appeal No. 77-1391

CERTIFICATE OF SERVICE

I, Stephen S. Blodgett, for William C. Kittell, Esq., hereby certify that I mailed two copies of the brief of Appellant and two copies of the printed case of Appellant in the above matter, to Jerome O'Neill, Esq., Assistant United States Attorney, at his business address, Office of the United States Attorney, Federal Building, Burlington, Vermont, 05402, by first class mail, postage pre-paid, this 25 day of February, 1978.

DATED at Burlington, Vermont this 25 day of February, 1978.


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